

Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL
RECEIVED
JUN - 2 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Cellular Service and Other Commercial)
Mobile Radio Services in the Gulf of)
Mexico)

WT Docket No. 97-112

DOCKET FILE COPY ORIGINAL

Amendment of Part 22 of the Commission's)
Rules to Provide for Filing and Processing)
of Applications for Unserved Areas in the)
Cellular Service and to Modify Other)
Cellular Rules)

CC Docket No. 90-6

COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard" or "Company"), acting through counsel and in accordance with the Commission's Second Further Notice of Proposed Rulemaking in the captioned dockets,¹ hereby files its initial comments.

I. Background.

1. Vanguard is one of the largest independent providers of cellular radio telephone service in the United States. The Company currently operates twenty nine (29) nonwireline (i.e., Frequency Block A) cellular systems east of the Mississippi with a total of over 565,000 subscribers. Vanguard is the parent company of Western Florida Cellular Telephone Corp.

¹ Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, WT Docket No. 97-112; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Second Further Notice of Proposed Rulemaking*, CC Docket No. 90-6, FCC 97-110, released April 16, 1997 (hereinafter, "*SFNPRM*").

("Western"), the nonwireline cellular licensee of the Pensacola, Florida and Ft. Walton Beach, Florida MSAs, and, as such, has a direct and substantial interest in the instant proceeding.

2. Vanguard supports the Commission's proposal to divide the Gulf of Mexico Service Area ("GMSA") into a GMSA Exclusive Zone and a GMSA Coastal Zone, and the Commission's proposed set aside of the coastal area out to twelve (12) nautical miles from the U.S. baseline as the scope of the Coastal Zone. However, Vanguard believes the Coastal Zone should be defined simply as an area 12 nautical miles from the U.S. baseline, and not pursuant to coordinates connected by "Great Circle Arcs." Although the Commission proposed this definition over a definition solely by distance for "administrative efficiency" and to "reduce the number of disputes that might otherwise arise," Vanguard believes a definition based solely on distance would be easier to administer. Vanguard also believes that the Commission must allow existing land-based licensees to keep their previously-approved, *de minimis* contour extensions into the Gulf of Mexico so that established service coverage is not interrupted in Gulf-adjacent MSAs and along the coast. Vanguard supports continued use of the 32 dBu contour methodology for measuring contours that extend into the Gulf from land-based cell sites. Vanguard opposes allowing the Gulf-based licensees to construct cell sites on land without the permission of land-based licensees. Vanguard also opposes dismissal of its long-pending Phase II applications which encompass portions of the GMSA Coastal Zone immediately adjacent to its Florida MSAs.

II. Previously-Approved, *De Minimis* Contour Extensions Into The Gulf Of Mexico Should Be Made Part Of Existing Land-Based Licensees' CGSAs.

3. Vanguard supports the Commission's proposal to make previously-approved, *de minimis* contour extensions into the Gulf of Mexico part of land-based licensees' Cellular Geographic Service Areas ("CGSA"). The Commission has already reviewed these extensions as part of its application process, and found the sites were justified because (i) the extensions were *de minimis*, (ii) the extensions beyond the land area were demonstrably unavoidable for technical reasons of sound engineering design, and (iii) the extensions do not extend into another carrier's CGSA or into unserved area.² In many cases, such *de minimis* extensions have already been incorporated into the cellular licensees' CGSAs pursuant to Section 22.911(c)(2) of the Commission's rules.³ Incorporating such pre-existing extensions as part of the CGSAs of land-based licensees would be consistent with the Commission's previous actions to grandfather such contours of MSA licensees.⁴

4. Vanguard adamantly opposes the Commission's alternate proposal to require land-based licensees to "pull back" their contour extensions into the Gulf. Such a mandate would dramatically impair service already provided on land within existing MSAs, as well as to coastal areas adjacent to MSAs. This is exactly the opposite result that the Commission is seeking to

² 47 C.F.R. § 22.903(d)(1).

³ Section 22.911(c)(2) allows service area boundary ("SAB") extensions into adjacent markets to become part of a licensee's CGSA if the extension covers an area that is "unserved" at the end of the adjacent market's five-year buildout period.

⁴ 47 C.F.R. § 22.911(c)(3); Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Second Report and Order, 7 FCC Rcd 2449, 2456 (1992).

achieve. See *SFNPRM*, at p. 14 (¶ 26) ("The public is not receiving reliable service in some coastal areas.")

5. In Vanguard's Pensacola and Ft. Walton Beach markets, for example, approximately ten cell sites or sectors, representing millions of dollars in investment, would need to be taken out of service in order to remove any SAB extensions from the GMSA.⁵ As a result, existing cellular service both within the MSA and in the adjacent coastal areas would be severely curtailed. The public interest dictates that service be allowed to continue so that cellular service to customers is not disrupted. It is also in the public interest not to force Gulf of Mexico licensees to construct additional or redundant transmitters to provide service to areas that are now receiving cellular service.⁶ As the Commission notes, even if service to coastal areas eventually was replaced by a Gulf of Mexico licensee, costs to customers undoubtedly would be increased due to the higher roaming charges these licensees generally charge for their services.⁷ Thus, the public interest clearly dictates that existing cellular coverage, within MSAs and along the coast, be preserved.⁸

⁵ See Declaration of Terry Brady (attached as Exhibit 1)("Brady Declaration").

⁶ *SFNPRM* at ¶ 36. Moreover, there is no assurance that they would or could do so.

⁷ *SFNPRM* at ¶ 34.

⁸ Indeed, there is an argument that the public interest dictates that the entities best-equipped to provide service in the GMSA Coastal Zone are the land-based providers, based on this cost argument alone. The Commission must consider this factor in formulating its final rules.

III. Existing Land-Based Licensees Should Retain The 32 dBu Contour Methodology For CGSA Establishment.

6. As a land-based cellular carrier, Vanguard urges the Commission to retain the 32 dBu contour methodology for land-based cell site contours, even if the contour of a land-based cell site extends over water. The administrative burden for land-based licensees now to implement a "hybrid" contour measurement system would be substantial and complex. Contour measurements for cell sites that have contours that extend beyond the coastline would need to be calculated separately from other cell sites. If the Commission adopts a formula that requires a different computer calculation every time a contour over the GMSA is added or modified, land-based licensee costs would increase in order to purchase new computer programs to perform such calculations. This would translate into higher costs for customers. Finally, Vanguard's engineers do not believe a "hybrid" contour measurement tool is currently available that would allow simultaneous plotting of the entire SAB contour.

7. Vanguard submits that such a burden should not be placed on land-based licensees that have contours extending into the GMSA. Many other cellular licensees have contour extensions over water, including licensees whose contours extend into the Atlantic and Pacific Oceans, and those that have systems that extend over large inland bodies of water such as the Great Lakes, without being required to take such extraordinary measures. To require such a wholesale engineering retooling is unfair and unnecessary and could wreak regulatory havoc from a compliance perspective. Certainly the U.S. Court of Appeals decision which has led to the *SFNPRM* does not require it ("Court Decision").⁹

⁹ Petroleum Communications, Inc. v. Federal Communications Commission, No. 92-1670 and RVC Services, Inc., D/B/A Coastal Communications Co. v. Federal Communications Commission, No. 93-1016, 22 F.3d 1164 (D.C. Cir. 1994).

8. Furthermore, the Commission's proposed Exclusive Zone for Gulf of Mexico cellular licensees will clearly define those licensees' CGSAs, and, consequently, the area in which those licensees will receive interference protection. Since the Exclusive Zone will start twelve nautical miles off the coast, it is unlikely that Gulf licensees will receive interference from cell sites within land-based systems. If the Gulf licensees do experience interference from land-based licensees, the Gulf licensees should work with the land-based licensees to resolve interference, in accordance with the Commission's long-established policies.¹⁰ If negotiated interference agreements cannot be reached among licensees, Gulf licensees can rely on the Commission's complaint process to protect their service area.

IV. Gulf Of Mexico Cellular Licensees Should Not Be Allowed To Construct Cell Sites On Land.

9. Vanguard opposes permitting land-based sites for GMSA licensees without consent from the land-based cellular licensee. This reflects a long-standing Commission position. The GMSA licensee cannot provide service to the Coastal Zone from land without causing interference to existing land-based systems. In many cases, due to the high land acquisition costs of coastal property or due to prohibitions on commercial development in coastal areas (such as Santa Rosa Island, Florida) GMSA licensees would economically want to locate

¹⁰ Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 1363, 1366 (1993). The contours of Western Florida's existing cell sites currently extend only 3 to 10 nautical miles into the Gulf. Vanguard has never had any complaints from Gulf-based licensees about interference from its land-based sites. See Brady Declaration.

sites several miles inland, thereby assuring interference. Vanguard understands that Gulf licensees will still be subject to the Commission's rules governing SAB extensions onto land areas; however, it is concerned that the Commission's elimination of the rule prohibiting land-based transmitters will be construed as granting such licensees the right to construct on land. The Commission has always conditioned GMSA cellular licenses on non-interference with land-based cellular systems.¹¹ With respect to the issue of the cost of locating cell sites in water, the Commission has on occasion previously stated that its rules do not guarantee a profitable business.¹² Thus, each cellular carrier that provides service within the GMSA, or that will provide service in the Coastal Zone, should be on notice that land-based cell sites may not be available.

V. Pending Phase II Unserved Area Applications Within The Proposed Coastal Zone Of The Gulf Of Mexico Should Be Processed In Accordance With The Commission's Unserved Area Rules.

10. Vanguard, through its licensee subsidiary Western, filed Phase II unserved area applications for the Gulf of Mexico in 1994. The purpose of the applications was to improve cellular coverage along the coast bordering the Pensacola and Ft. Walton Beach MSAs. The Commission should process these applications, and other applications with technical proposals that are limited to the Coastal Zone, under existing unserved area rules. The applications have

¹¹ "Accordingly, any grant [of a cellular license for the Gulf of Mexico] to Petrocom, or any other cellular operator in the Gulf will be conditioned on noninterference with land-based cellular systems." Petroleum Communications, Inc., Memorandum Report and Order, 54 RR 2d 1020, 1023 (1983).

¹² See, e.g., Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1726 (1991).

been pending due to the ongoing court proceeding regarding the Gulf of Mexico licensees. The Commission is resolving the GMSA in a way that is consistent with the Court Decision directive and the Gulf of Mexico licensees' requests. However, grant of Phase II applications with technical proposals that remain within the Coastal Zone would not affect the rights of existing Gulf of Mexico licensees. It is unfair after almost three years for the Commission to dismiss these pending applications, especially when the substantive rights of Gulf of Mexico licensees will not be affected.

11. Indeed, the Commission's proposal to dismiss these long-pending applications, only to have them shortly refiled, makes little administrative sense. It imposes additional costs on licensees who dutifully complied with rules long in effect at the time the applications were filed. It imposes additional processing burdens on the Commission and is not required by the Court Decision.

12. If the Commission is adopting this approach for the sole purpose of seeking to generate revenues for the Federal government through potential auctions, by "creating" mutually exclusive applications which can be subject to competitive bidding, such a basis for choosing auctions is expressly prohibited by the current auction statute. 47 U.S.C. § 332(c)(1)(C) (1995 & 1997 Supp.). Moreover, the legislative history of the auction statute admonishes the Commission to avoid mutual exclusivity. H. Rep. No. 111, 103rd Cong., 1st Sess., p. 258 (May 25, 1993). Yet, the Commission is doing exactly the opposite here.¹³

¹³ Moreover, it is not clear that there would be any significant economic gain from dismissing applications and conducting competitive bidding in the areas along the Florida coast. As the Commission observed in the *SFNPRM*, oil drilling is not permitted there and it is difficult to see how other than a land-based licensee could serve these regions. Where economic gain is

VI. Conclusion.

13. Vanguard supports the Commission's proposal to create an Exclusive Zone and Coastal Zone within the GMSA. The Commission must ensure that service to the public, particularly in coastal waters, is not impaired, and that its costs are not substantially increased. The Commission can ensure such a result by incorporating previously-approved, *de minimis* extensions from land-based cellular licensees onto their CGSAs, by retaining the 32 dBu calculations for cell sites located on land, and processing long-pending Phase II applications to serve the coastline under existing rules, rather than dismissing applications and requiring that they be refiled, in a rather obvious attempt to manufacture competing applications. Finally, the Commission should also clarify that Gulf of Mexico licensees do not have special "rights" to construct cellular base stations on land.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: 

Paul C. Besozzi
Janet Fitzpatrick
PATTON BOGGS, L.L.P.
2550 M Street, NW
Washington, DC 20037
(202) 457-5292

Its Attorneys

Dated: June 2, 1997

questionable, it makes no sense for the Commission to gear up for auctions. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7387, 7392 (1994). Nothing in the auction statute requires the Commission to do so.

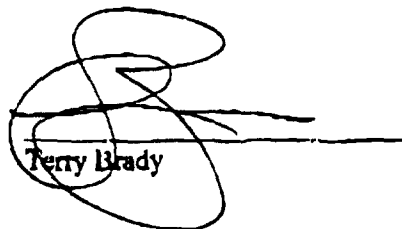
DECLARATION OF TERRY BRADY

1. Terry Brady, do hereby state under penalty of perjury as follows:

1. I am a Director of Engineering employed by Vanguard Cellular Systems, Inc. ("Vanguard"), the parent company of Western Florida Cellular Telephone Corp. ("WFCTC"), since 1990.
2. I was a Digital Switching Systems Technician for the United States Marine Corps from 1982 to 1990, in which capacity I maintained switching systems that provided land-based communications systems for the United States Marine Corps.
3. As a Director of Engineering with Vanguard, it is my responsibility to analyze the propagation of radio waves in connection with assuring reliable service within numerous cellular systems operated by Vanguard in MSAs and RSAs throughout the Eastern United States, including the Fort Walton Beach and Pensacola MSAs.
4. I have reviewed the foregoing Comments. My review and analysis indicates that WFCTC would need to deactivate ten (10) cell sites/sectors within the Pensacola MSA and Ft. Walton Beach MSA if it were forced to remove its Service Area Boundary ("SAB") contours from the Gulf of Mexico. Such deactivation would substantially impair cellular service within the Pensacola MSA and Ft. Walton Beach MSA and in the adjacent coastal waters.
5. The 32 dBu contours from WFCTC's current cell sites extend no more than 3 to 10 nautical miles into the Gulf, entirely within the Commission's proposed Coastal Zone. WFCTC has not received any interference complaints from Gulf of Mexico Service providers as a result of these previously-approved contour extensions.

The facts of which I have personal knowledge are true and correct. All other facts are true and correct to the best of my knowledge and belief.

Date: June 2, 1997


Terry Brady